Arab Malaysia Finance Bhd v Shamsuddin bin Hj Ahmad & Anor

HIGH COURT (ALOR SETAR) — ORIGINATING SUMMONS NO 24–151 OF 1996
MOHD HISHAMUDIN J
12 MARCH 1997

Land Law *— Charge — Order for sale — Land administrator ordered sale of land after enquiry — No bidders — Application to court to substitute for order of sale of land administrator an order of sale by court — Whether application under s 256 of the National Land Code 1965 — Whether compliance with O 83 of the Rules of the High Court 1980 necessary — National Land Code 1965 ss 256 & 265(3) — Rules of the High Court 1980 O 83*

The defendants, the landowners of a piece of land ('the land') charged the land to the plaintiff to secure a fixed loan for the benefit of a third party. The third party failed to comply with the repayment schedule. The plaintiff then applied for an order of sale from the land administrator. After an inquiry, the land administrator issued an order that the land be sold by public auction. There were no bidders at the first sale and also at the second sale with a reduced reserve price. The plaintiff then filed the present originating summons pursuant to s 265(3) of the National Land Code 1965 ('the NLC') to substitute for the order of sale of the land administrator an order of sale by the court. The defendants contested the plaintiff's application, arguing, inter alia, that there was non-compliance of O 83 r 3 of the Rules of the High Court 1980 ('the RHC').

Held, allowing the plaintiff's application:

It appeared that the defendants were treating the plaintiff's originating summons as though it was an application under s 256 of the NLC. Section 256 of the NLC and O 83 of the RHC were irrelevant as far as the present application was concerned because s 256 provides the procedure to be adopted for the sale of land held under a registry title whereas the title of the property in question was a land office title. It was not legally possible for the plaintiff to have proceeded under s 256 and O 83. In fact, it had correctly proceeded under s 260 by applying for an order for sale from the land administrator.

The present reference to this court found its basis in s 265(3) of the NLC. The wording of the provision of s 265(3) is clear, ie the reason why the matter is to be referred to the High Court must be that there were no bidders at the second sale. The High Court hearing the reference must exercise its powers under sub-s (3)(c) with this reason in mind. Therefore, the court could not dwell on the issue whether or not the order of sale ought to have been made in the first place or whether or not there had been due compliance with O 83. Instead, the court should direct its mind on the issue as to what was the best means of selling the property in question bearing in mind the interests of the chargor and the chargee and the fact that the second auction held at the land office failed to attract any bidder.

While it is true that the first limb of para (c) of s 265(3) does make a reference to s 256, it cannot be construed as requiring the court to treat this originating summons (which is essentially the land administrator's reference) as an application by the chargee under s 256. This reference to s 256 is merely to confer upon the court the power to substitute for the order of sale of the land administrator an order of sale by the court as if the court order were made under s 256. Further, the words '... or make such other order as it may think just' in the second limb of the paragraph are intended to give the court the power to make alternative orders.

Therefore, the reference to s 256 in sub-s (3)(c) of s 265 could not be construed as the imposition of a duty or the conferment of a right on the chargee to make a fresh application for sale under s 256; neither could the chargor be permitted to treat the reference as such. A construction such as this would not only depart from the very purpose of the reference but would also cause an injustice to the chargee who has had, in compliance with s 260, already successfully obtained an order for sale from the land administrator (see pp 341F–I, 342A–C, 343E–I and 344B–C) .

Obiter:

Although s 265(3)(b) states that 'the Land Administrator shall refer the matter to the Court' — which means that there is a duty on the land administrator himself to refer the matter to the court — however, based on authority, the proper party to file the originating summons in the High Court should be the chargee and not the land administrator (see p 342C–F); *Collector of Land Revenue, Kota Bharu v Yusoff bin Yunus* [1977] 2 MLJ 53 followed.

[Bahasa Malaysia summary

Defendan-defendan, pemilik sebidang tanah ('tanah tersebut') telah menggadaikan tanah tersebut kepada plaintif untuk mencagar suatu pinjaman tetap untuk faedah pihak ketiga. Pihak ketiga telah gagal mematuhi jadual bayaran balik. Plaintif kemudiannya memohon untuk satu perintah jualan daripada pentadbir tanah. Selepas suatu siasatan, pentadbir tanah mengeluarkan satu perintah bahawa tanah tersebut dijual melalui lelong awam. Tiada pihak yang membuat tawaran di jualan pertama dan juga di jualan kedua dengan harga rizab yang dikurangkan. Plaintif kemudiannya memfailkan saman pemula ini menurut s 265(3) Kanun Tanah Negara 1965 ('KTN') untuk mengganti perintah jualan pentadbir tanah dengan perintah jualan oleh mahkamah. Defendan-defendan mencabar permohonan plaintif, dengan menghujahkan, antara lain, bahawa terdapat ketidakpatuhan A 83 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT').

Diputuskan, membenarkan permohonan plaintif:

Kelihatan bahawa defendan-defendan menganggap saman pemula plaintif bagaikan satu permohonan di bawah s 256 KTN. Seksyen 256 KTN dan A 83 KMT adalah tidak relevan sejauh mana permohonan

ini adalah berkaitan kerana s 256 memperuntukkan prosedur untuk digunapakai untuk jualan tanah yang dipegang di bawah hakmilik daftar manakala hakmilik harta berkenaan adalah hakmilik pejabat tanah. Adalah tidak mungkin di sisi undang-undang untuk plaintif meneruskan tindakan di bawah s 256 dan A 83. Malah, ia telah meneruskan dengan betulnya di bawah s 260 dengan memohon perintah jualan daripada pentadbir tanah.

Rujukan kepada mahkamah ini adalah berdasarkan s 265(3) KTN. Susunan kata peruntukan s 265(3) adalah jelas, iaitu alasan mengapa perkara itu hendaklah dirujuk kepada Mahkamah Tinggi mestilah bahawa tiada pihak membuat tawaran di jualan kedua. Mahkamah Tinggi yang mendengar rujukan mestilah melaksanakan kuasanya di bawah sub-s (3)(c) dengan mengingati alasan ini. Maka, mahkamah tidak boleh terlalu memikirkan isu sama ada perintah jualan patut dibuat atau tidak terlebih dahulu atau sama ada atau tidak terdapat pematuhan wajar A 83. Sebaliknya, mahkamah patut memberi perhatian kepada isu tentang apakah cara yang paling baik untuk menjual harta berkenaan dengan mengingati kepentingan penggadai dan pemegang gadaian dan hakikat bahawa lelong kedua yang diadakan di pejabat tanah telah gagal menarik perhatian sebarang pihak membida.

Manakala adalah benar bahawa bahagian pertama perenggan (c) s 265(3) memang membuat rujukan kepada s 256, ia tidak boleh ditafsirkan sebagai menghendaki mahkamah menganggap saman pemula ini (yang pada dasarnya adalah rujukan pentadbir tanah) sebagai satu permohonan oleh pemegang gadaian di bawah s 256. Rujukan kepada s 256 cumalah untuk mengurniakan kuasa kepada mahkamah untuk mengganti perintah jualan pentadbir tanah dengan perintah jualan mahkamah seolah-olah perintah mahkamah dibuat di bawah s 256. Seterusnya, perkataan-perkataan '... atau membuat apa-apa perintah lain sebagaimana difikirkannya adil' dalam bahagian kedua perenggan tersebut bertujuan untuk memberikan mahkamah kuasa untuk membuat perintah alternatif.

Maka, rujukan kepada s 256 dalam s 265(3)(c) tidak boleh ditafsirkan sebagai pengenaan kewajipan atau pengurniaan hak ke atas pemegang gadaian untuk membuat permohonan baru untuk jualan di bawah s 256; penggadai juga tidak boleh dibenarkan menganggap rujukan sebagai demikian. Tafsiran sedemikian bukan sahaja menyimpang daripada tujuan sebenar rujukan tetapi juga akan menyebabkan ketidakadilan kepada pemegang gadaian yang telah berjaya memperolehi satu perintah jualan daripada pentadbir tanah melalui pematuhan s 260 (lihat ms 341F–I, 342A–C, 343E–I dan 344B–C) .

Obiter:

Walaupun s 265(3)(b) menyatakan bahawa 'Pentadbir Tanah hendaklah merujukkan perkara itu kepada Mahkamah' — yang bermakna bahawa terdapat satu kewajipan pada pentadbir tanah sendiri untuk merujuk perkara itu kepada mahkamah — namun

demikian, berdasarkan autoriti, pihak yang wajar memfailkan saman pemula di Mahkamah Tinggi haruslah merupakan pemegang gadaian dan bukan pentadbir tanah (lihat ms 342C–F); *Collector of Land Revenue, Kota Bharu v Yusoff bin Yunus* [1977] 2 MLJ 53 diikut.]

Notes

For cases on order for sale, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 1471–1500.

Case referred to

Collector of Land Revenue, Kota Bharu v Yusoff bin Yunus [1977] 2 MLJ 53 (refd)

Legislation referred to

National Land Code 1965 ss 256, 257, 265(3), 418, 447(1)
Rules of the High Court 1980 O 83 r 3

Joy W Appukutan (*Kitson Foong & Associates*) for the plaintiff.
Saranjit Singh (*KS Narayanan*) for the defendants.

Mohd Hishamudin J: This originating summons is made pursuant to s 265(3) of the National Land Code 1965 ('the NLC'). The prayers in the application, inter alia, are:

(a) That this court substitute for the order of the land administrator, an order for sale under s 256 so that the land held under HS (M) 49/1975, PT No 389 Mukim Alor Malai, Daerah Kota Setar, Negeri Kedah and charged to the plaintiff pursuant to a charge in accordance with the law and registered under Presentation No 1503/1984, Jilid No 158 Folio No 57 is sold by public auction to settle the debt of RM367,534.51 as at 15 January 1996 together with interest thereon at the rate of 14% pa from 16 January 1996 till the date of full realization;

(b) that the senior assistant registrar and/or deputy registrar is at liberty to make all subsequent and necessary orders, in particular —
   (i) To fix a reserve price for the purpose of the sale;
   (ii) A licensed auctioneer is appointed to conduct the sale in accordance with s 259 of the National Land Code 1965; and
   (iii) If the sale is aborted to adjourn the same to a date to be fixed by the senior assistant registrar and/or deputy registrar.

The facts leading to the present application are as follows. The land sought to be auctioned had been charged to the plaintiff by the defendants as landowners, vide a charge dated 7 February 1984, to secure a fixed loan of RM80,000 for the benefit of a third party, Tungku Maryam. When Tungku Maryam failed to comply with the repayment schedule, the plaintiff instructed its solicitors to issue a letter of demand. The plaintiff took steps to enforce the charge when the letter of demand of 7 July 1988 failed to solicit any response from the defendants. Form 16D was served through its solicitors' letter of 10 September 1988 (exh CCP3 of encl 2) followed by the service of Form 16G dated 2 June 1992 (exh CCP4 in encl 2).

These events culminated in the holding of an inquiry under s 261 of the NLC at the Land Office in Kota Setar before the land administrator on 5 August 1992. The defendants were duly notified of the inquiry but they failed to appear before the land administrator. At the conclusion of the inquiry, the land administrator issued an order dated 5 August 1992 stating that the land be sold by public auction at the reserve price of RM80,000. Although it was open to the defendants to appeal against this decision under s 418 of the NLC, they did not do so, and, accordingly, the first sale was carried out on 11 January 1993. As there were no bidders at the first sale, a second sale was conducted on 24 May 1993 at the reserve price of RM70,000. Again there were no bidders.

The defendants filed two affidavits (encls 9 and 18) to contest the present application. In his written submission, En Saranjit Singh, learned counsel for the defendants, summarized the issues raised in the said affidavits as follows:

(i) that there was non-compliance of O 83 r 3 of the Rules of the High Court 1980;

(ii) that the accounts rendered by the plaintiff were defective, improper and incorrect;

(iii) that the demand was defective; and

(iv) that there was cause to the contrary as to why the application ought to be dismissed.

From the arguments of the defendants, it appears that they are treating the plaintiff's originating summons as though it is an application under s 256 of the NLC. This, I think, is a fundamental misconception on their part.

Section 256 states:

> Application to Court for order for sale
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> (1) This section applies to land held under —
> (a) Registry title;
> (b) the form of qualified title corresponding to Registry title; or
> (c) subsidiary title,
>
> and to the whole of any undivided share in, or any lease of, any such land.
>
> (2) Any application for an order for sale under this Chapter by a chargee of any such land or lease shall be made to the Court in accordance with the provisions in that behalf of any law for the time being in force relating to civil procedure.
>
> (3) On any such application, the Court shall order the sale of land or lease to which the charge relates unless it is satisfied of the existence of cause to the contrary.

To my mind, s 256 and O 83 are irrelevant as far as the present application is concerned. This is because s 256 provides the procedure to be adopted for the sale of land held under a registry title whereas the title of the property in question is a land office title. It was not legally possible for the plaintiff to have, in the first place, proceeded under s 256 and O 83.

In fact, in the present case it had, in the first place, correctly proceeded under s 260 by applying for an order for sale from the land administrator. The present reference to this court by the land administrator on the grounds that there were no bidders at the land office at the public auctions finds its basis in s 265(3) of the NLC which provides:

> 265 Procedure at sale
>
> ...
>
> (3) If at the subsequent sale no bid is received at or above the reserve price —
>
> (a) the land or lease shall be withdrawn from the sale;
>
> (b) the Land Administrator shall refer the matter to the Court; and
>
> (c) the Court may substitute for the order of the Land Administrator for an order for sale under section 256, or make such other order as it may think just.

On a preliminary point, upon reading sub-s (3), I would have thought the words:

> (b) the Land Administor shall refer the matter to the Court;

mean that there is a duty on the land administrator himself to refer the matter to the court as soon as possible; and in the light of s 447(1) of the NLC, he should do so by way of filing an originating summons in the High Court citing himself as the plaintiff, and the chargee and chargor as defendants. However, in *The Collector of Land Revenue, Kota Bharu v Yusoff bin Yunus* [1977] 2 MLJ 53, Mohamed Zahir J had a different view. The learned judge held that the proper party to file the originating summons in the High Court should be the chargee and not the land administrator, for (at p 54):

> To adopt the other procedure will undoubtedly reduce the function of the collector to that of the chargee.

The learned judge opined that there were practical difficulties if it is the land administrator who has to file the originating summons in court. His Lordship pointed out (at p 54):

> In other words, the collector will be doing the work of the chargee, which as an administrative officer, the collector is not supposed to do. In adopting this procedure the collector will have to serve the summons on the chargor and if the chargor dies in the meantime, to apply for L/A or appoint someone else to represent his estate or to apply for substituted service or service out of jurisdiction as the case may be. There is also the question of who will foot the bill. The collector may be held unnecessarily responsible for damages or costs for any defaults. The chargee during these processes is a mere onlooker.

Accordingly, his Lordship ruled as to what should be the correct procedure (at p 54):

> I am therefore of the opinion that in matters of this nature, it will be sufficient for the collector to issue a certificate to be called Certificate of Reference under s 265(3)(b) addressed to the court if requested by the

A chargee and deliver it to the chargee. Such certificate should contain particulars of the sale concerned and the reasons for the sale not being successful. Being a valuation officer, the collector should also certify if the reserve price fixed is the market price. This will guide the court if an application is made for the reduction of the reserve price.

The chargee will then apply by way of originating summons to the B court, supported by affidavit exhibiting the Certificate of Reference of the collector, for any order he may deem expedient. The summons should be served on the chargor. It may be noted that under s 265(3)(c) the court may order that the collector put up the land sale for a third time without having to undergo the cumbersome and more expensive court sale process, particularly if the reserve price of the land is so low, as it is in this case (only C $1,300).

I accordingly direct the parties herein to adopt this procedure which will form the practice for similar cases in the future.

Although, with the greatest respect, the above judgment appears, to my mind, to be at variance with the strict letter of the law, to my knowledge, D hitherto, the above decision has never been reversed by a higher court. Bearing this in mind and also the fact that, in the present case, the issue as to the correctness of the above decision has never been raised, I propose not to depart from that decision.

Reverting to the actual issue at hand, in my judgment, the wording E of the above provision is clear and, that is, there should be only one reason why the matter is to be referred to the High Court and that reason must be that there were no bidders at the second sale. Now, if this is (and must be) the only reason for the reference, then the High Court hearing the reference must exercise its powers under sub-s (3)(c) above with this reason in mind. If the instant case is viewed in this light — and, indeed, it F must be so viewed — the court cannot, as urged by the defendants, dwell on the issue whether or not the order of sale ought to have been made in the first place or whether or not there had been due compliance with O 83. Instead, the court should direct its mind on the issue as to what is the best means of selling the property in question bearing in mind the interests of G the chargor and the chargee and the fact that the second auction held at the land office failed to attract any bidder.

While it is true that the first limb of para (c) of s 265(3) does make a reference to s 256, I do not think it can be construed as requiring the court to treat this originating summons (which is essentially the land H administrator's reference) as an application by the chargee under s 256. This reference to s 256 is, to my mind, merely to confer upon the court the power to substitute for the order of sale of the land administrator an order of sale by the court as if the court order is made under s 256. This entails making incidental orders on matters such as determining the reserve price and/or directing the registrar of the High Court to carry out the sale in I accordance with the provisions of s 257.

I am further of the view that the second limb of that paragraph, that is to say, the words '... or make such other order as it may think just', are intended to give the court the power to make alternative orders, for

example, to order that the property be sold by private treaty or to refer the matter again to the land administrator directing him to conduct the sale for the third time with the court determining the reserve price to be adopted by him.

It, therefore, follows that the reference to s 256 in sub-s 3(c) of s 265 cannot be construed as the imposition of a duty or the conferment of a right on the chargee to make a fresh application for sale under s 256; neither can the chargor be permitted to treat the reference as such. A construction such as this would not only depart from the very purpose of the reference, as pointed out earlier, but would also cause an injustice to the chargee who has had, in compliance with s 260, already successfully obtained an order for sale from the land administrator. The order of the land administrator has not been challenged either by way of an appeal or otherwise (the draft 'saman pemula' — exh DMF-1 of encl 18 — is only an intended course of action by the respondents to challenge the order of the land administrator). The respondents must be deemed to have conceded that the land administrator had correctly made the order for sale.

Accordingly, I allow the plaintiff's application with costs. The date of the public auction to be carried out by the court shall be 12 June 1997.

Application allowed.

Reported by Jafisah Jaafar